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[redacted] of the United States

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 205

J. W. FREE, PETITIONER,

vs.

JAMES F. BLAND.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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[fol. 4]

IN THE
DISTRICT COURT OF UPSHUR COUNTY, TEXAS
115TH JUDICIAL DISTRICT

No. 12,109

J. W. FREE

VS.

JAMES F. BLAND, Individually
and as Independent Executor

PLAINTIFF'S ORIGINAL PETITION—Filed March 2, 1959

To Said Honorable Court:

Now comes J. W. Free, hereinafter styled plaintiff, complaining of James F. Bland, individually and as Independent Executor of the Estate of Ida Free, deceased, hereinafter styled defendant, and represents:

I.

That plaintiff is a resident of Upshur County, Texas, that the defendant resides in Hunt County, Texas, and is the duly appointed and qualified Independent Executor of the Estate of Ida Free, deceased, the administration upon which estate is now pending in the County Court of Upshur County, Texas.

II.

And for cause of action, plaintiff alleges that his wife, Ida Free, died testate in Upshur County, Texas, on April 23, 1958, and that he and Ida Free were lawfully married many years prior thereto, and lived together as husband and wife in Upshur County, Texas for many years prior thereto and up to the time of her death; that the said Ida Free left a written will, duly probated in Upshur County,

Texas, in which she named her only child, James F. Bland, defendant herein, as the Independent Executor of her es- [fol. 5] tate, and left to the said James F. Bland all of her property, except several cash gifts made to some of her brothers and a sister, all of which have heretofore been paid by the Executor.

III.

That during his marriage with Ida Free, the said J. W. Free purchased various and sundry United States Government Bonds, among which were the following bonds set out below. These bonds were purchased between the months of May, 1941 and November, 1945, eleven of said bonds being in the principal sum of $1,000 each, one bond being in the sum of $5,000, seven of said bonds being in the sum of $10,000 each. The numbers of each of said bonds, the amounts thereof, the date the same was purchased, and the payees in said bonds are as follows:

Number	*Date of Purchase*	*Amount*	*Payable to:*
M4744268E	May, 1941	$1,000.00	Mrs. Mary Ida Free or John W. Free
M4744269E	Nov., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744270E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744271E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744272E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M5693827E	Feb., 1944	1,000.00	John W. Free or Mrs. Mary Ida Free
M5693828E	Feb., 1944	1,000.00	John W. Free or Mary Ida Free
M998211F	May, 1945	1,000.00	John W. Free or Mrs. Ida Free

Number	*Date of Purchase*	*Amount*	*Payable to:*
M1000566F	Nov., 1945	1,000.00	J. W. Free or Mrs. Ida Free
M1000567F	Nov., 1945	1,000.00	J. W. Free or Mrs. Ida Free
M998212F	May, 1945	1,000.00	John W. Free or Mrs. Ida Free
V214788F	Dec., 1944	5,000.00	John W. Free or Mrs. Ida Free
X149353F	June, 1944	10,000.00	John W. Free or Mrs. Ida Free
X149372F	June, 1944	10,000.00	John W. Free or Mrs. Ida Free
[fol. 6]			
X188315F	May, 1945	10,000.00	John W. Free or Mrs. Ida Free
X188313F	May, 1945	10,000.00	John W. Free or Mrs. Ida Free
X188357F	May, 1945	10,000.00	J. W. Free or Mrs. Ida Free
X188581F	Mov., 1945	10,000.00	J. W. Free or Mrs. Ida Free

All of said bonds with the capital E after the number are "E" bonds, and all of said bonds with a capital F after the number are "F" bonds, and all bonds with a capital M preceding the figures are $1000 bonds, the one with a capital V preceding the figure is a $5,000 bond, and those with a capital X preceding the figure are $10,000 bonds. Copies of said bonds are hereto attached and made a part hereof for all purposes.

IV.

All of the above bonds were purchased by the said J. W. Free with community funds of himself and his deceased wife, Ida Free, and plaintiff alleges that at the death of Ida Free, this plaintiff became vested with the full ownership of the above described bonds, and although the same were purchased with community funds, no portion of said bonds vested in the defendant by the terms of the will of Ida Free, deceased, and defendant does not now own any right, title or interest in or to said bonds, although he claims to own an undivided one-half interest therein.

V.

All of said bonds are located and situated in Upshur County, Texas.

Wherefore, premises considered, plaintiff prays that the defendant be cited to appear and answer herein, and that on a trial hereof, he have judgment against the defendant, individually and as Independent Executrix of the Estate of [fol. 7] Ida Free, deceased, for the title to and possession of the United States Government Bonds above described, together with all accrued interest thereon, and that this court further enter its judgment declaring that plaintiff is the sole owner of said bonds and that the defendant has no right, title or interest therein, and for costs of suit, and such other relief to which plaintiff may be justly entitled.

Fulton, Hancock & McClain, Box 500, Gilmer, Texas; Edwin M. Fulton, Box 500, Gilmer, Texas, Attorneys for Plaintiff.

[File endorsement omitted]

[fol. 27]

IN THE 115TH JUDICIAL DISTRICT COURT OF
UPSHUR COUNTY, TEXAS

No. 12,109

[Title omitted]

DEFENDANT'S ORIGINAL ANSWER—Filed July 13, 1959

Now comes James F. Bland, individually and as independent executor of the estate of Ida Free, deceased, defendant in the above entitled and numbered cause, and files this his original answer to plaintiff's original petition heretofore filed herein on the 2nd day of March, 1959, and for such answer says:

I.

Defendant denies generally each and every material allegation in plaintiff's original petition contained.

Wherefore, Premises Considered, defendant prays that all relief sought by plaintiff herein be by the court denied, and that he recover his costs herein.

Olin P. McWhirter, Greenville, Texas; Florence, Garrison & Holt, Gilmer, Texas; By G. L. Florence, Attorneys for Defendant.

[File endorsement omitted]

[fol. 28]

IN THE DISTRICT COURT OF UPSHUR COUNTY, TEXAS
115TH JUDICIAL DISTRICT

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed July 31, 1959

To Said Honorable Court:

Now comes J. W. Free, Plaintiff in the above styled and numbered cause, and moves the Court, pursuant to

Rule 166A, of the Texas Rules of Civil Procedure, to enter a Summary Judgment in Plaintiff's favor, for all the relief demanded in Plaintiff's Petition.

In this connection, Plaintiff would show that Defendant has failed to submit any affirmative defense and that the defense of general denial submitted by the Defendant is insufficient as a matter of law, and raises no issue to Plaintiff's cause of action; that there is no genuine issue as to any material fact, and Plaintiff is entitled to a judgment, as a matter of law.

This Motion is based upon the pleadings of the Plaintiff, on the affidavit of Edwin M. Fulton hereto attached, and the agreement attached to said affidavit, as well as the certified copies attached thereto.

Wherefore, premises considered, Plaintiff prays that judgment be entered as prayed for in his Petition.

Fulton, Hancock & McClain, Box 500, Gilmer, Texas; Edwin M. Fulton, Box 500, Gilmer, Texas, Attorneys for Plaintiff.

[fol. 29]

IN THE DISTRICT COURT, UPSHUR COUNTY

ORDER SETTLING CASE FOR HEARING—July 31, 1959

At the request of the Plaintiff, the Court has set Plaintiff's Motion for Summary Judgment for trial at Gilmer, Texas, at 10:00 A.M., on the 15 day of August, A. D. 1959, and Plaintiff is directed to give Defendant notice thereof, under the provisions of Rule 166A of the Rule of Civil Procedure of the State of Texas. This 31 day of July, 1959.

Looney E. Lindsey, Judge, 115th District Court, Upshur County, Texas.

Certificate of Service (omitted in printing).

[fol. 30]

IN THE DISTRICT COURT OF UPSHUR COUNTY, TEXAS

115TH JUDICIAL DISTRICT

[Title omitted]

AFFIDAVIT OF EDWIN M. FULTON IN SUPPORT OF MOTION

In support of the Motion of Plaintiff, J. W. Free, for Summary Judgment against the Defendant, James F. Bland, individually and as Independent Executor, in the above styled and numbered cause, Edwin M. Fulton, the undersigned, makes this affidavit, and thereby on oath states the following:

My name is Edwin M. Fulton. I reside in Gilmer, Upshur County, Texas. I am over twenty-one years of age, and am of sound mind and have never been convicted of any crime or offense, and have personal knowledge of every statement herein made.

I am an attorney of record for J. W. Free, Plaintiff in the above styled and numbered cause. I prepared the Original Petition and filed this cause on behalf of my client, J. W. Free. I am cognizant of all the facts stated in said Petition, and know that each and every allegation made therein is true.

Attached to said Petition are copies of nineteen bonds, issued by the United States Government, and payable jointly to J. W. Free and Ida Free, or John W. Free and Mary Ida Free. The originals of said bonds are in the possession of Alvin Spencer, Cashier of Farmers & Merchants National Bank, at Gilmer, Texas, and said bonds are deposited in the vault of said bank and the original bonds will be exhibited to the Court on the trial of Plaintiff's Motion for Summary Judgment. The copies of said bonds attached to Plaintiff's Original Petition are true and correct copies of the originals, and were made under the direction of affiant, in the office of affiant immediately prior to the time the Original Petition was filed in this case.

[fol. 31] Attached hereto is a contract, duly entered into by and between Olin P. McWhirter, as attorney for James

F. Bland, and Edwin M. Fulton, as attorney for J. W. Free, dated May 26, 1958, by the terms of which, it was agreed that the originals of the bonds, copies of which are attached to Plaintiff's Original Petition, would be delivered to Alvin Spencer, Cashier as aforesaid, who should hold the same in escrow until a final judgment was rendered adjudicating the title and ownership thereof. As stated, the contract is hereto attached, and the signature of Olin P. McWhirter thereon is his true signature, and the signature of Alvin Spencer is his genuine signature. Affiant signed said instrument with the said McWhirter and Spencer.

I have known J. W. Free and his wife, Ida Free, since the year 1931. At the time I first knew them, they were married and they continued to live together as husband and wife until the death of Mrs. Ida Free, on April 23, 1958. Attached hereto is a certified copy of her death certificate.

Mrs. Ida Free left a written will, and attached hereto is a certified copy of that will. By the terms of that will, she appointed her son, James F. Bland, as Independent Executor. The will was duly probated in the County Court of Upshur County, Texas, and attached hereto is a certified copy of the order of the County Court, probating said will and appointing James F. Bland as Independent Executor of said estate. After the appointment, the said James F. Bland qualified by taking the oath of office, and a certified copy of his oath of office is attached hereto. On May 12, 1958, letters testamentary were issued to the said James F. Bland, and a thermo-fax copy of the original is hereto attached and made a part hereof.

Witness My Hand this 30th day of July, A.D. 1959.

Edwin M. Fulton

Subscribed and Sworn to this 30th day of July, A.D. 1959.

[fol. 32] (Seal)

Shirley Osborne, Notary Public, Upshur County, Texas.

[fol. 33]

EXHIBIT TO AFFIDAVIT

THE STATE OF TEXAS)
COUNTY OF UPSHUR)

It is agreed by and between J. W. Free and James F. Bland, by and through their respective attorneys, that said J. W. Free and wife, Ida Free, prior to their death owned the following United States Bonds payable jointly to J. W. Free and Ida Free, or John W. Free and Mary Ida Free, to-wit:

Number	*Amount*	*Value*
M4744268E	$ 1,000.00	$ 1,175.00
M4744269E	1,000.00	1,162.50
M4744270E	1,000.00	1,150.00
M4744271E	1,000.00	1,150.00
M4744272E	1,000.00	1,150.00
M5693827E	1,000.00	1,124.00
M5693828E	1,000.00	1,124.00
M998211F	1,000.00	1,000.00
M1000566F	1,000.00	1,000.00
M1000567F	1,000.00	1,000.00
M998212F	1,000.00	1,000.00
V214788F	5,000.00	5,000.00
X149353F	10,000.00	10,000.00
X149372F	10,000.00	10,000.00
X188077F	10,000.00	10,000.00
X188313F	10,000.00	10,000.00
X188315F	10,000.00	10,000.00
X188357F	10,000.00	10,000.00
X188581F	10,000.00	10,000.00

It is the position of J. W. Free that the title to these jointly payable bonds vested in him at the death of Mrs. Free, and that said bonds did not pass under the terms of Mrs. Free's will and form no part of her estate.

It is agreed that the above bonds will be and they are hereby being delivered to Alvin Spencer, Cashier of Farmers & Merchants National Bank of Gilmer, Texas,

who shall hold the bonds in escrow until the parties or their attorneys advise him to deliver said bonds to one or the other, or some third party, or until it is determined by a final judgment of a Court of competent jurisdiction that such bonds belong to J. W. Free, in which event he will deliver the same to the said Free. If the final judgment of a Court of competent jurisdiction determines that said bonds are jointly owned by the parties, then the bonds [fol. 34] will be divided equally and delivered to said parties.

DATED at Gilmer, Texas and executed in triplicate this 26th day of May, A.D. 1958.

Olin P. McWhirter
Attorney for James F. Bland

Edwin M. Fulton
Attorney for J. W. Free

I hereby acknowledge receipt of the above described bonds, and agree to hold them for the parties according to the terms of this contract.

Alvin Spencer, Cashier
Farmers & Merchants National Bank

[fol. 34a]

EXHIBIT TO AFFIDAVIT

(See opposite) ☞

Exhibit To Affidavit

STATE OF TEXAS

CERTIFICATE OF DEATH

STATE FILE NO.

TEXAS DEPARTMENT OF HEALTH — BUREAU OF VITAL STATISTICS

MEDICAL CERTIFICATION

VS-112, REV. 1/58

1. PLACE OF DEATH a. COUNTY: Upshur	2. USUAL RESIDENCE (Where deceased lived. If institution resident, before admission) a. STATE: Texas b. COUNTY: Upshur
b. CITY OR TOWN (If outside city limits, give precinct no.): Gilmer c. LENGTH OF STAY in this place: 20	c. CITY OR TOWN (If outside city limits, give precinct no.): 304 N. Montgomery
d. NAME OF (If not in hospital, give street address) HOSPITAL OR INSTITUTION	d. STREET ADDRESS (If rural, give location)
e. IS PLACE OF DEATH INSIDE CITY LIMITS? YES [X] NO [ ]	e. IS RESIDENCE INSIDE CITY LIMITS? YES [X] NO [ ] f. IS RESIDENCE ON A FARM? YES [ ] NO [X]
3. NAME OF DECEASED (Type or print) (a) First: MARY (b) Middle: IDA (c) Last: FREE	4. DATE OF DEATH: April 23, 1958
5. SEX: Female 6. COLOR OR RACE: White 7. Married [X] Never Married [ ] Widowed [ ] Divorced [ ]	8. DATE OF BIRTH: Sept. 18, 1876 9. AGE (In years last birthday): 81 If UNDER 1 YEAR: Months, Days If UNDER 24 HRS.: Hours, Minutes
10a. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired): Housewife 10b. KIND OF BUSINESS OR INDUSTRY: Housewife	11. BIRTHPLACE (State or foreign country): Smith County, Texas 12. CITIZEN OF WHAT COUNTRY? U.S.A.
13. FATHER'S NAME: S. E. SHELTON	14. MOTHER'S MAIDEN NAME: FANNIE TUTEL
15. WAS DECEASED EVER IN U.S. ARMED FORCES? (Yes, no, or unknown): No (If yes, give war or dates of service): None	16. SOCIAL SECURITY NO.: None 17. INFORMANT: J. W. FREE
18. CAUSE OF DEATH [Enter only one cause per line for (a), (b), and (c).] PART I. DEATH WAS CAUSED BY: IMMEDIATE CAUSE (a): Cerebral Hemorrhage — Interval between onset and death: 5 days Conditions, if any, which gave rise to above cause (a), stating the underlying cause last. DUE TO (b): DUE TO (c):	
PART II. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO THE TERMINAL DISEASE CONDITION GIVEN IN PART (a): No	19. WAS AUTOPSY PERFORMED? YES [ ] NO [X]
20a. ACCIDENT [ ] SUICIDE [ ] HOMICIDE [ ] No 20b. TIME OF INJURY: Hour, a.m., p.m., Month, Day, Year	20c. DESCRIBE HOW INJURY OCCURRED. (Enter nature of injury in Part I or Part II of Item 18.)
20d. INJURY OCCURRED WHILE AT WORK? [ ] WHILE NOT AT WORK? [ ] No	20e. PLACE OF INJURY (e.g., in or about home, farm, factory, street, office building, etc.) 20f. CITY, TOWN, OR LOCATION COUNTY STATE
21. I hereby certify that I attended the deceased from 4-19 19 58 to 4-23- 19 58 and last saw the deceased alive on 19 Death occurred at m. on the date stated above, and to the best of my knowledge, from the cause stated.	
22a. SIGNATURE (Degree or title): J. W. FENLAW M.D. 22b. ADDRESS: GILMER, TEXAS 22c. DATE SIGNED: 4-26-58	
23a. BURIAL, CREMATION, REMOVAL (Specify): Burial 23b. DATE: April 24, 1958 23c. NAME OF CEMETERY OR CREMATORY: East Mt. Cemetary	
23d. LOCATION (City, town, or county) (State): Upshur County, Texas 24. FUNERAL DIRECTOR'S SIGNATURE: J.B. Hill Jr. Crowley Funeral Home, Gilmer, Texas	
25a. REGISTRAR'S FILE NO.: 1119 25b. DATE REC'D BY LOCAL REGISTRAR: 5-1-1958 25c. REGISTRAR'S SIGNATURE: L.E. Stracener Sr. J.P. No. 1	

IF DECEASED SERVED IN U.S. ARMED FORCES, FILL OUT THE FOLLOWING:

Is the deceased reported to have been in such service?
Name of organization in which service was rendered?
Serial number of discharge papers or adjusted service certificate?
Name of next of kin or of next friend?
Post Office Address?

IF DECEASED WAS MARRIED, FILL OUT THE FOLLOWING:

Name of husband or wife	Age in years

IF DECEASED IS AN UNIDENTIFIED PERSON, FILL OUT THE FOLLOWING:

Color of Hair?	Color of Eyes?	Height? Ft. In.	Weight?
Deformities?		Tattoo Marks?	
Other marks of identification?			

THE STATE OF TEXAS I
COUNTY OF UPSHUR I

I, O. W. Loyd, County Clerk, Upshur County, Texas, hereby certify that the within and foregoing matter of writing constitutes a full, true and correct copy of original, as same appears filed for record in this office bearing file No. . . Vol. 12, page 2.

GIVEN under my hand and seal of office, at Gilmer, Texas, this the 30 day of July A.D. 1959.

O.W. LOYD, County Clerk
Upshur County, Texas.

By Ena Gordon Deputy.

(Seal).

[fol. 35]

EXHIBIT TO AFFIDAVIT

THE STATE OF TEXAS)
COUNTY OF PALO PINTO)

I, Ida Free, of the County of Upshur and the State of Texas, being of sound and disposing mind and memory, and being desirous to settle my worldly affairs while I have strength to do so, do make this my last will and testament, hereby revoking all others heretofore made.

1.

I desire and direct that my body be buried in a decent and Christianlike manner, suitable to my circumstances and condition in life.

2.

I desire and direct that my just debts be paid out of my estate without delay, by my executor, to be hereinafter appointed.

3.

I hereby give and bequeath to my sisters, Lizzie Pettis and Beulah Esterman, and my sister-in-law, Mrs. Vinnie Shelton, all of my clothing, to be equally divided among them, share and share alike.

4.

I hereby give and bequeath to my granddaughter, Jimmie Goerge Bland, all of my jewelry.

5.

I hereby give and bequeath to my sister, Lizzie Pettis, of Gilmer, Texas, the sum of Five Thousand and no/100 Dollars ($5,000.00), to be paid out of my estate by my executor, hereinafter named, as soon after my decease as conveniently may be done, in the following manner, to-wit: said Five Thousand and no/100 Dollars ($5,000.00) to be placed in a bank nearest the residence of my sister, Lizzie [fol. 36] Pettis, with direction and instruction that the

same be withdrawn at the rate of Fifty and no/100 Dollars ($50.00) per month and no more, during her natural life, and upon her death, then the remainder, if any, of said Five Thousand and no/100 Dollars ($5,000.00) to go to her children in equal parts, share and share alike.

6.

I hereby give and bequeath to my sister, Beulah Westerman, of Alice Texas, the sum of Five Thousand and no/100 Dollars ($5,000.00) to be paid out of my estate by my executor, hereinafter named, as soon after my decease as conveniently may be done, in the following manner, to-wit: said Five Thousand and no/100 Dollars ($5,000.00) to be placed in a bank nearest the residence of my sister, Beulah Westerman, with direction and instruction that the same be withdrawn at the rate of Fifty and no/100 Dollars ($50.00) per month and no more, during her natural life, and upon her death, then the remainder, if any, of said Five Thousand and no/100 Dollars ($5,000.00) to go to her children in equal parts, share and share alike.

7.

I hereby give and bequeath to my brother, A. L. Shelton, of Gilmer, Texas, the sum of Five Thousand and no/100 Dollars ($5,000.00), to be paid out of my estate by my executor, hereinafter named, as soon after my decease as conveniently may be done, in the following manner, to-wit: said Five Thousand and no/100 Dollars ($5,000.00) to be placed in a bank nearest the residence of my brother, A. L. Shelton with direction and instruction that the same be [fol. 37] withdrawn at rate of Fifty and no/100 Dollars ($50.00) per month and no more, during his natural life, and upon his death, then the remainder, if any, of said Five Thousand and no/100 Dollars ($5,000.00) to go to his children in equal parts, share and share alike.

8.

After the payment of all my just debts and the foregoing legacies, I give and bequeath all the residue of my estate,

both real and personal property including my household and kitchen furniture that I may die seized and possessed of, to my beloved son, James F. Bland, Greenville, Texas, in fee simple, to manage, sell, or dispose of as he may wish or see proper. It is also my wish that if there by any of the household and kitchen furniture that my said beloved son, James F. Bland, does not want, then and in that event. I request that he divide same with my two sisters and brother, to-wit: Lizzie Pettis, Beulah Westerman, and A. L. Shelton, share and share alike.

9.

In order that there may be no misunderstanding, I hereby state that all the property that I now own is the community interest that I have with my beloved husband, J. W. Free, as I have heretofore given to my beloved son, James F. Bland, Sixty Two and one half acres (62 and ½) of land out of the G. W. Hooper Survey in Upshur County, Texas, same being known as the J. W. F. Bland home place, and said property is now and has been for a number of years the property of the said James F. Bland.

10.

I hereby constitute and appoint my beloved son, James F. Bland, of Greenville, Texas, should he survive me, as [fol. 38] sole and independent executor of this, my last will and testament, and direct that no bond or security be required of him as executor. It is my further wish that my beloved son advise and consult, with my brother-in-law, Guy Westerman, in matters pertaining to my said estate. In the event that my beloved son, James F. Bland, not survives me, then and in that event, I hereby nominate and appoint my beloved brother-in-law, Guy Westerman, of Alice, Texas, executor of this, my last will and testament, and direct that no bond or security be required of him as executor.

11.

It is my will that no other action shall be had in the County Court in the administration of my estate than to

prove and record this will and return an inventory and appraisement of my estate and list of claims.

IN TESTIMONY WHEREOF I have hereto set my hand in Mineral Wells, Texas, this the 24th day of September A.D. 1940 in the presence of the two witnesses who attest same at my request.

Ida Free

The above instrument was signed, declared, and published by Ida Free, as her last will and testament, in our presence, and we, at her request and in her presence and in the presence of each other, sign out names hereto as attesting witnesses, this the 24th day of September A.D. 1940 at Mineral Wells, Texas.

Lillian Muhurin
Olin P. McWhirter

ENDORSED: No. 2704 WILL OF IDA FREE FILED 4-29-58
R. C. VIVIAN CLERK UPSHUR COUNTY

[fol. 39]

THE STATE OF TEXAS)
COUNTY OF UPSHUR)

I, O. W. Loyd, County Clerk, Upshur County, Texas, hereby certify that the within and foregoing matter of writing constitutes a full, true and correct copy of original, as same appears filed for record in this office bearing file No. 2704, Vol. 37 page 432.

GIVEN under my hand and seal of office, at Gilmer, Texas, this the 30 day of July A.D. 1959.

O. W. LOYD, County Clerk
Upshur County, Texas

By Exa Gordon Deputy.

(Seal).

[fol. 40]

EXHIBIT TO AFFIDAVIT

No. 2704

ESTATE OF
IDA FREE,
DECEASED

On this, the 12th day of May, A.D. 1958 came on to be heard the application of James F. Bland for the probate of the last will and testament of Ida Free, deceased, now produced in Court, and the evidence, a statement of which is filed in this case, being fully considered by the Court, and it appearing to the Court that the said Ida Free is deceased; that citation thereof has been duly made as required by law, to which no objection has been made; that the Court has jurisdiction and venue over said estate; that the said James F. Bland is named and appointed in said will Executor thereof without bond and that he is not disqualified therefor, and that four years have not elapsed since the death of the deceased.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the court that the last will and testament of the said Ida Free, deceased, is hereby admitted to probate and record and the testimony shall be recorded in the minutes of this Court. IT IS FURTHER ORDERED BY THE COURT that Letters Testamentary there of be granted to the said James F. Bland without bond, he having first taken the required oath and that no other action shall be had in this suit in the administration of said estate than to return into this Court an inventory, appraisement and a list of claims of said estate.

And it further appearing to the Court that Bruce Morris, H. A. Wheeler, and Ralph Byman are citizens of Upshur County, Texas, and disinterested persons in said estate, it is therefore ordered that they or any two of them may act, and they are hereby appointed to appraise the estate, both real and personal of Ida Free, deceased.

J. W. Bryce
County Judge Upshur County, Texas.

[fol. 41]

ENDORSED: No. 2704
ORDER PROBATING WILL AND APPOINTING APPRAISERS FILED MAY 12, 1958, R.C. VIVIAN CLERK UPSHUR COUNTY

THE STATE OF TEXAS)
COUNTY OF UPSHUR)

I, O. W. Loyd, County Clerk, Upshur County, Texas, hereby certify that the within and foregoing matter of writing constitutes a full, true and correct copy of original, as same appears filed for record in this office bearing file No. 2704 Vol. 37, page 438.

GIVEN under my hand and seal of office, at Gilmer, Texas, this the 30 day of July A.D. 1959.

O. W. Loyd, County Clerk,
Upshur County, Texas

By Exa Gordon Deputy

[fol. 42]

OATH OF EXECUTOR

I do solemnly swear that the writing which has been offered for Probate is the last Will of Ida Free so far as I know or believe and that I will well and truly perform all the duties of executor of said Will of the Estate of Ida Free, deceased.

James F. Bland

Sworn to and subscribed before me this 12th day of May 1958.

Olin P. McWhirter
Notary Public, Hunt County, Texas

(SEAL).

ENDORSED: No. 2704 ESTATE OF IDA FREE DECEASED OATH OF EXECUTOR FILED MAY 12, 1958 R.C. VIVIAN CLERK UPSHUR COUNTY

THE STATE OF TEXAS)
COUNTY OF UPSHUR)

I, O. W. Loyd, County Clerk, Upshur County, Texas, hereby certify that the within and foregoing matter of

writing constitutes a full true and correct copy of original as same appears filed for record in this office bearing file No. 2704 Vol. 37 Page 440.

GIVEN under my hand and seal of office, at Gilmer, Texas, this the 30 day of July A.D. 1959.

O.W. LOYD, County Clerk
Upshur County, Texas.

By Exa Gordon Deputy.

(Seal).

[fol. 43] [File endorsement omitted]

LETTERS TESTAMENTARY

THE STATE OF TEXAS)
COUNTY OF UPSHUR)

IN COUNTY COURT
UPSHUR COUNTY, TEXAS

I, R. C. Vivian Clerk of the County Court of Upshur County, Texas, do hereby certify that on the 12th day of May A.D. 1958, James F. Bland was duly granted by said Court Letters Testamentary of the Estate of Ida Free deceased and that he qualified as such Executor of said Estate on the 12th day of May A.D. 1958 as the law requires, and that said appointment is still in full force and effect.

Witness my hand and seal of office at Gilmer, Texas, this 12th day of May A.D. 1958.

R.C. VIVIAN, CLERK
COUNTY COURT UPSHUR COUNTY, TEXAS.

BY Edrie King Deputy.

(Seal).

[fol. 44]

IN THE 115TH JUDICIAL DISTRICT COURT OF
UPSHUR COUNTY, TEXAS

[Title omitted]

ANSWER AND CROSS ACTION—Filed August 28, 1959

To the Honorable Looney E. Lindsey, Judge of Said Court:

Now comes James F. Bland, individually and as Independent Executor of the Estate and under the Will of Ida Free, deceased, defendant in the above entitled and numbered cause, and files this his first amended original answer to plaintiff's original petition heretofore filed herein on the 2nd day of March, 1959, and for such answer says:

I.

Defendant admits that he is the duly appointed and qualified independent executor of the estate of Ida Free, deceased, the administration upon which estate is now pending in the County Court of Upshur County, Texas.

II.

Defendant also admits that plaintiff, J. W. Free, and Ida Free, deceased, were lawfully married to each other many years prior to the filing of this suit, to-wit: on January 7, 1899, and lived together as husband and wife until the date of the death of the said Ida Free, which occurred on April 23, 1958.

III.

Defendant also admits that the said Ida Free left a written will, which has been duly probated by an order and judgment of the County Court of Upshur County, Texas, in which she named her only child, James F. Bland, defendant herein, as Executor of her estate and left to the said James F. Bland, by the terms and provisions of said will, all of her property, except certain cash gifts made to some of her brothers and a sister, all of which

cash gifts have heretofore been paid by the Executor, defendant herein.

[fol. 45] IV.

Defendant also admits that during the marriage relation between J. W. Free and Ida Free, the said J. W. Free purchased various and sundry U.S. Government bonds, described and identified in Paragraph 3 of plaintiff's original petition, which paragraph is here referred to and made a part hereof as fully and to the same extent as if fully copied herein.

V.

Defendant also admits that all of said bonds mentioned and referred to in said paragraph of plaintiff's original petition, were and are "E" bonds, except those with a capital "F" after the number are "F" Bonds, and all bonds with a capital "M" preceding the figure are $1,000.00 bonds, and the one with a capital "V" preceding the figure is a $5,000.00 bond, and those with a capital "X" preceding the figures are $10,000.00 bonds, a copy of said bonds being attached to plaintiff's original petition, which copies are here referred to and made a part hereof for all purposes.

VI.

Defendant also admits, as alleged in plaintiff's petition, in paragraph 4 thereof, that "all of the above bonds were purchased by the said J. W. Free with community funds of himself and his deceased wife, Ida Free."

VII.

Further and specially answering herein, this defendant says that none of the bonds above mentioned and referred to had been cashed at the time and on the date of the death of the said Ida Free, nor has any of said bonds been cashed since her death, but same are still in the possession and under the control of the plaintiff, J. W. Free.

VIII.

Further and specially pleading herein, this defendant says that all of said bonds sued upon by plaintiff herein,

having been acquired during the marriage relation of plain-
[fol. 46] tiff and his wife, Ida Free, during their marriage relation to each other, as a result of their joint labors, constituted community property between the plaintiff and the said Ida Free, and were a part of the community estate of the said J. W. Free and Ida Free at the date of the death of the said Ida Free, and that by virtue thereof, and under and by virtue of the terms and provisions of the will of the said Ida Free, this defendant became the owner of the community interest owned by Ida Free in said bonds at the date of her death.

IX.

Further and specially pleading herein, and in the alternative, this defendant says that should he be mistaken in the allegations contained in the preceding paragraph of this answer, as to his being the owner of one-half (½) of said bonds, or one-half (½) interest therein, then he says that inasmuch as said bonds were paid for out of community funds of the said J. W. Free and Ida Free, and the community estate was depleted by reason of the purchase of said bonds by the said J. W. Free, without the knowledge or consent of his wife, Ida Free, that he by reason thereof, and being the sole beneficiary under the will and of the estate of Ida Free, is entitled to be reimbursed to the extent of one-half (½) of the community funds used by the plaintiff, J. W. Free, in the purchase of said bonds, and that a lien should be created against the interest of J. W. Free in said bonds, or in the alternative, against the estate of J. W. Free, to secure the payment to him of one-half (½) of the community funds expended by J. W. Free in the purchase of said bonds.

Premises Considered, this defendant prays that the relief sought by plaintiff herein be denied, or in the alternative, he prays that he be decreed by decree of this court to be entitled to one-half (½) interest in said bonds, or in the alternative, a one-half (½) interest in the amount of said bonds, and that a lien be created against said bonds, or in the alternative, against the estate of the said J. W.
[fol. 47] Free, to secure the payment of the value of one-

half (½) interest in the proceeds of said bonds, and for such other and further relief, general or special, to which defendant may be entitled, either at law or in equity, by reason of the facts hereinabove alleged.

Olin P. McWhirter, Greenville, Texas; Florence, Garrison & Holt, Gilmer, Texas, By G. L. Florence, Attorneys for Defendant.

CROSS ACTION

Now comes James F. Bland, individually and as Independent Executor under the will and of the estate of Ida Free, deceased, and files this cross action against J. W. Free, in which he will hereinafter be called Cross Plaintiff, and J. W. Free will hereinafter be called Cross Defendant, and would with respect show to the court the following:

I.

That Cross Plaintiff resides in Greenville, Hunt County, Texas, and Cross Defendant, J. W. Free resides in Upshur County, Texas, but is at this time and has been for a considerable period of time prior hereto, temporarily confined in a hospital at Gladewater, Gregg County, Texas.

II.

Cross Plaintiff further represents to the court that J. W. Free, the original plaintiff in this case, and Ida Free, deceased, were married to each other on or about January 7, 1899, and lived together as husband and wife until the date of the death of the said Ida Free, on April 23, 1958; that no child was born to J. W. Free and Ida Free as a result of their marriage to each other; that no child was adopted by either of said parties; that Ida Free had been [fol. 48] married prior to her marriage to J. W. Free, to one ———— Bland, and as a result of the marriage of the said Ida Bland and ———— Bland, only one child was born, to-wit: James F. Bland, Cross-Plaintiff herein.

III.

Further and specially pleading herein, Cross Plaintiff shows to the court that Ida Free died testate in Upshur

County, Texas, about April 23, 1958; that the said Ida Free left a written will executed under the forms and solemnities required by law to constitute same a valid, legal will, a copy of which will is hereto attached, marked Exhibit "A" * and made a part hereof for all purposes as fully and to the same extent as if fully copied herein. That said will so made by the said Ida Free has been duly and legally admitted to probate and record by the Probate Court of Upshur County, Texas, as the last will and testament of the said Ida Free, a copy of which judgment admitted said will to probate and record is attached hereto, marked Exhibit "B" ** for identification and made a part hereof for all purposes as fully and to the same extent as if fully copied herein.

IV.

That Cross Plaintiff has duly and legally qualified as independent executor under the will and of the estate of Ida Free, as required by law, has taken the oath, as provided by law, but has made no bond, inasmuch as the will of the said Ida Free provided that he not be required to make bond, and by reason of the foregoing, he is interested in the estate, property, claims and equities of Ida Free, deceased.

V.

Further and specially pleading herein, Cross Plaintiff says that during the marriage of J. W. Free and Ida Free, the said J. W. Free, without the knowledge or consent of Ida Free, his wife, purchased various and sundry U.S. Government bonds, among which were the following bonds, [fol. 49] set out below; that said bonds, listed below, were purchased between the months of May, 1941 and November 1945, eleven (11) of said bonds being in the principal sum of $1,000.00 each, one bond in the sum of $5,000.00, seven (7) bonds being in the sum of $10,000.00 each, the numbers of said bonds, the amounts thereof, the dates same

* Clerk's Note—Said will appears as an Exhibit at side folio 35, printed page 11.

** Clerk's Note—Said judgment appears as an Exhibit at side folio 40, printed page 16.

were purchased and the payee in said bonds being as follows:

Number	*Date of Purchase*	*Amount*	*Payable to:*
M4744268E	May, 1941	$ 1,000.00	Mrs. Mary Ida Free or John W. Free
M4744269E	Nov., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744270E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744271E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M4744272E	Dec., 1941	1,000.00	Mrs. Mary Ida Free or John W. Free
M5693827E	Feb., 1944	1,000.00	John W. Free or Mrs. Mary Ida Free
M5693828E	Feb., 1944	1,000.00	John W. Free or Mrs. Mary Ida Free
M998211F	May, 1945	1,000.00	John W. Free or Mrs. Mary Ida Free
M1000566F	Nov., 1945	1,000.00	J. W. Free or Mrs. Ida Free
M1000567F	Nov., 1945	1,000.00	J. W. Free or Mrs. Ida Free
M998212F	May, 1945	1,000.00	John W. Free or Mrs. Ida Free
V214788F	Dec., 1944	5,000.00	John W. Free or Mrs. Ida Free
X149353F	June, 1944	10,000.00	John W. Free or Mrs. Ida Free
X149372F	June, 1944	10,000.00	John W. Free or Mrs. Ida Free
X188077F	Nov., 1944	10,000.00	John W. Free or Mrs. Ida Free
X188315F	May, 1945	10,000.00	John W. Free or Mrs. Ida Free
X188313F	May, 1945	10,000.00	John W. Free or Mrs. Ida Free
X188357F	May, 1945	10,000.00	J. W. Free or Mrs. Ida Free
X188581F	Nov., 1945	10,000.00	J. W. Free or Mrs. Ida Free

All of said bonds with the capital "E" after the number are "E" bonds, and all of said bonds with a capital "F" after the number are "F" bonds, and all bonds with a capital "M" preceding the figures are $1,000.00 bonds, the one [fol. 50] with a capital "V" preceding the figure is a $5,000.00 bond, and those with a capital "X" preceding the figure are $10,000.00 bonds. Copies of said bonds are hereto attached and made a part hereof for all purposes.

VI.

Further and specially pleading herein, Cross Plaintiff says that each of the bonds mentioned above, was purchased by J. W. Free with community funds earned by J. W. Free and Ida Free as a result of their joint labors during their marriage to each other; that by reason of the purchase of said bonds by the said J. W. Free with community funds belonging to J. W. Free and Ida Free, the said bonds became as between Cross Plaintiff and Cross Defendant, community assets of the said J. W. Free and his deceased wife, Ida Free, and this Cross Plaintiff should be decreed to be the owner of a one-half interest in said bonds, including principal thereof and interest thereon to this date.

VII.

Pleading in the alternative, Cross Plaintiff says that should he be mistaken in his allegations that he is the owner of a one-half interest in said bonds, together with interest thereon, then he says that said bonds, having been purchased by the said J. W. Free without the knowledge or consent of his then wife, Ida Free, with community funds, same having been acquired by J. W. Free and Ida Free during the time they lived together as husband and wife, and as a result of their joint labors, depleted the community estate and funds of the said J. W. Free and Ida Free to the extent of the purchase price of said bonds, and that by reason thereof, and the facts hereinabove alleged, the community estate of the said J. W. Free and Ida Free should be reimbursed in the event J. W. Free

is decreed to be the owner of said bonds, to the extent of one-half (½) of the community funds used by the said J. W. Free in the purchase of said bonds, and a lien should be created against said bonds to secure the payment to [fol. 51] Cross Plaintiff herein of one-half (½) of the total value of said bonds, together with interest thereon, as is provided in said bonds, to this date, or in the alternative, that a lien be created against the property and estate of the said J. W. Free to secure the payment to Cross Plaintiff herein of one-half (½) of the total amount of said bonds, together with interest thereon at this date.

Wherefore, Premises considered, Cross Plaintiff prays that J. W. Free, Cross Defendant herein, be cited to appear and answer this cross action, and upon a final trial hereof, Cross Plaintiff be decreed to be the owner of a one-half (½) interest in said bonds; or, in the alternative, that he recover judgment against Cross Defendant, J. W. Free, for one-half (½) the alue of said bonds to the date of said trial, with interest thereon, as is provided for in said bonds, and that a lien be created against J. W. Free's interest in said bonds to secure the payment of said amount, viz., one-half (½) of the total value of said bonds as of the date of the trial.

In the alternative, he prays that if J. W. Free should be decreed by judgment of this court to be the owner of said bonds, that then, and in that event, he recover of and from J. W. Free, Cross Defendant herein, a one-half (½) interest in said bonds, or a sum equal to one-half (½) of the value of said bonds, together with interest thereon to the date of trial, by reason of the fact that same were purchased with community funds by J. W. Free, and that a lien be created against the estate of J. W. Free to secure the payment to Cross Plaintiff of one-half (½) the value of said bonds, together with interest thereon to the date of trial hereo, (sic) and for such other and further relief, general or special either at law or in equity, to which Cross Plaintiff may be entitled by virtue of the facts hereinabove alleged.

[fol. 52] Olin P. McWhirter, Greenville, Texas; Florence, Garrison & Holt, Gilmer, Texas, by G. L. Florence, Attorneys for Cross Plaintiff.

[fol. 60]

[File endorsement omitted]

IN THE DISTRICT COURT OF UPSHUR COUNTY, TEXAS

115TH JUDICIAL DISTRICT

[Title omitted]

ANSWER OF CROSS DEFENDANT, J. W. FREE—
Filed September 11, 1959

To Said Honorable Court:

Now comes J. W. Free, Cross Defendant in the Cross Action instituted against him by the Defendant, as Cross Plaintiff, and files this his Original Answer to Cross Plaintiff's Original Petition in Cross Action, and alleges:

I.

Cross Defendant excepts to all of Section VII of said petition and says the allegations therein contained do not allege a cause of action, and of this special exception, Cross Defendant prays judgment of the Court.

II.

Cross Defendant denies all the allegations in said Petition, except those that may have been alleged in his Original Petition as Plaintiff in this cause.

Wherefore, premises considered, Cross Defendant prays that Cross Plaintiff take nothing, and that he recover his costs.

Fulton, Hancock & McClain, Box 500, Gilmer, Texas;
Edwin M. Fulton, Box 500, Gilmer, Texas.

[fol. 61]

IN THE DISTRICT COURT OF UPSHUR COUNTY, TEXAS

115TH JUDICIAL DISTRICT

No. 12,109

J. W. FREE

VS.

JAMES F. BLAND, Individually and as Independent Executor

JUDGMENT—November 23, 1959

On the 23rd day of October, A. D. 1959, came on for trial and hearing the Motion for Summary Judgment, heretofore filed herein by Plaintiff, J. W. Free, on July 31, 1959, and all parties appeared in person or by their attorneys and announced ready for trial on said Motion, and the Court, after hearing said Motion, finds that the same has been made in proper form and time, and that proper service thereon has been made, and that all parties are before the Court; and,

The Court, having considered the pleadings on file and the affidavits, finds that they show an absence of any genuine issue as to any material fact, and that judgment should be rendered for Plaintiff, J. W. Free, adjudging him to be the owner of the United States Government Bonds sued for herein; and,

It further appearing to the Court that said bonds were purchased by J. W. Free with the community funds of himself and his wife, Ida Free, now deceased, and were of the value of $87,035.50 at the death of Ida Free, and the Court finds that judgment should be rendered for James F. Bland, as Independent Executor of the Estate of Ida Free, and as sole legatee and devisee under the will of Ida Free, deceased, against the said J. W. Free for the sum of $43,517.75, being one-half of the value of said United States Government Bonds at the death of Ida

Free, and that a lien should be fixed and foreclosed against the proceeds thereof to secure the payment of such sum;

[fol. 62] It is, therefore, Ordered, Adjudged and Decreed by the Court, on this the 23rd day of November, A. D. 1959, that the Plaintiff, J. W. Free, do have and recover of and from the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, judgment for the title to and possession of the United States Government Bonds, more particularly described in Plaintiff's Original Petition, and in Plaintiff's Motion for Summary Judgment; and,

It is Further Ordered, Adjudged and Decreed that the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, do have and recover of and from J. W. Free, the sum of $43,517.75, one-half of the value of said United States Government Bonds at the death of Ida Free, and a lien on said one-half of said proceeds is here fixed to secure the payment of this judgment and such lien is hereby foreclosed and Plaintiff and Defendant may have such writs and other processes as are necessary or advisable to enforce this judgment.

The costs herein are taxed against Plaintiff and execution shall issue for the collection thereof.

Plaintiff, J. W. Free, in open Court, duly excepted to said judgment and gave notice of appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana.

Looney E. Lindsey, Judge Presiding.

[File endorsement omitted]

Cost Bond on Appeal for $1000 (omitted in printing).

[fol. 67]

DISTRICT COURT

UPSHUR COUNTY, TEXAS

BILL OF COST

No. 12,109

J. W. FREE, Plaintiff,

vs.

JAMES F. BLAND, Ind. & as Ind. Exr., Defendant.

115TH DISTRICT COURT

E. M. Fulton, Attorney for Plaintiff.

Florence, Garrison & Holt, Attorneys for Defendant.

To Officers of Court, Dr.

To District Clerk's Fees	$ 9.45
To Sheriff's Fees	$ 3.70
To Transcript on appeal	$35.00
To Library Fee	$ 1.00
Total	$49.15

A True and Correct Account.

Attest: Edward Poole, Clerk District Court, Upshur County, Texas, By ....., Deputy.

Please Mail Check.

[fol. 68] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 70]

IN THE COURT OF CIVIL APPEALS OF TEXAS

Appeal from the District Court of Upshur County, Texas.

No. 7223

J. W. FREE, Appellant,

vs.

JAMES F. BLAND, Individually, and as Independent Executor, Appellee.

OPINION—July 12, 1960

Appellant, J. W. Free, sued appellee James F. Bland, individually and as independent executor of the estate of Mary Ida Free, for recovery of the title to and possession of certain United States Savings Bonds, together with accrued interest thereon, and for a judgment declaring that appellant was the sole owner of said bonds and that appellee had no rights therein.

Both parties are in agreement upon the essential facts of the case. J. W. Free and Mary Ida Free were husband and wife until her death on April 23, 1958. Among other United States Savings bonds purchased during this marriage, from the years 1941 through 1945, were the following co-owner bonds, payable to "Mrs. Mary Ida Free or Mr. John W. Free"; "Mr. John W. Free or Mrs. Mary Ida Free"; "John W. Free or Mrs. Ida Free"; "J. W. Free or Mrs. Ida Free"; and "Mr. John W. Free or Mrs. Ida Free", to-wit: seven "E" bonds of the par value of $1,000.00 each; four "F" bonds of the par value of $1,000.00 each; one "F" bond of the par value of $5,000.00; and seven "F" bonds of the par value of $10,000.00 each. Upon the death of Mary Ida Free, all the co-owner bonds listed above were uncashed, having an aggregate value of $87,035.50. Mary Ida Free's written will, duly probated in Upshur County, Texas, vested the bulk of her estate in her son, James F.

Bland, appointing him independent executor, for which he duly qualified.

In appellee's answer and cross action to appellant's suit, he claimed that, because the Frees used community funds to purchase the co-owner bonds listed above, he as the heir to the bulk of Mrs. Free's estate was entitled to one-half the bonds, or, as an alternative, to one-half their value. Appellant filed a motion for summary judgment, with supporting affidavits, to which the appellee filed no reply, nor controverting affidavits. Upon a hearing on appellant's motion, the trial court, on November 23, 1959, rendered judgment for the appellant for the title to and possession of said co-owner bonds, but at the same time ordered that appellee, in equity, ought to recover from appellant one-half of the value of the bonds, and fixed a lien on the proceeds thereof to enforce the judgment.

[fol. 71] J. W. Free has appealed. Appellant's first three points of error are based upon the contention that, since the purchase of the co-owner United States Savings Bonds constituted a contract which guarantees, among its other provisions, payment to either surviving co-owner of the bonds in the event of the death of the other, and, since there was no pleading or proof that purchase of the bonds was in fraud of the community property rights of Mary Ida Free, the trial court erred in rendering judgment against the appellant for one-half of the value of the bonds and fixing a lien thereon. In this connection it is appellant's prime position that under the record in this cause he is entitled to the rendition of a judgment in his favor for the full title and possession of the bonds in question and all the fruits thereof, free and clear of any and all claims and liens asserted by appellee.

The regulations of the United States Treasury Department which pertain here (Department Circular No. 530, as revised) provide that "If either co-owner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving co-owner will be recognized as the sole and absolute owner of the bond and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor * * * ."

A few courts in states other than Texas, notably the Louisiana Supreme Court in Slater v. Culpepper (222 La. 962, 64 S.W. (2) 234, 37 A.L.R. (2) 1216), have held this regulation to be merely a method of payment designed for the convenience of the government; also see the case of In the Matter of the Estate of Bertha Q. Allen, deceased, 343 P. (2) 867, Supreme Court of Washington, which follows the Slater v. Culpepper case, but which also recognizes that the Supreme Court of Texas reached the opposite conclusion in Ricks v. Smith, Tex., 318 S. W. (2) 439, and in the course of its opinion in said cause the Supreme Court of Washington stated:

> *"We are not unmindful of the fact that the Supreme Court of Texas, although badly divided, reached the opposite conclusion in Ricks* v. *Smith,* 318 S. W. 2d 439. However, we prefer and adopt the view of the Supreme Court of Louisiana in Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 237, 37 A. L. R. 2d 1216. * * * "

Appellee relies principally on the Slater v. Culpepper case, supra, the Allen estate case, supra, and the dissenting opinion of Justice Walker in Ricks v. Smith, supra.
[fol. 72] The Supreme Court of Texas in Ricks v. Smith, Tex., 318 S. W. (2) 439, divided 6 to 3, with Chief Justice Hickman writing the opinion for the majority. We quote from said majority opinion in part as follows:

> "It cannot be questioned that the opinion of the Court of Civil Appeals follows the rule adopted by a majority of the courts. A number of cases from other jurisdictions are cited in the annotation in 37 A.L.R. 2d 1216 et seq. The annotation is to the Louisiana case of Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 37 A.L.R. 2d 1216, which case declined to give controlling effect to the Treasury regulations incorporated in the bonds, holding that to do so would nullify community property law of that state. While that case is the only one cited from a State having community property law, we agree with the Court of Civil Appeals that the purchase of the bonds was by a contract which created a property right,—not merely a method of pay-

ment for the convenience of the Treasury Department. There is no sanctity of the community property law above that of other types of law. To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution. The solution as to the property rights of the surviving co-owner of "or" bonds rests in contract, and that contract becomes a part of the bonds. The decisions in this jurisdiction cited in the opinion of the Court of Civil Appeals, while not deciding the precise question here presented, are certainly in harmony with the majority rule followed by that court. We, therefore, approve that holding."

The Court of Civil Appeals' opinion in Smith v. Ricks, Tex. Civ. App. 308 S. W. (2) 941, in specifically refusing to follow the Slater v. Culpepper case stated:

"In further support of their contention, appellees strenuously urge upon the Court the reasoning employed in Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 37 A.L.R. 2d 1216; Winsberg v. Winsberg, 220 La. 398, 56 So. 2d 730. Both of these decisions follow the holdings of a minority of the courts (See 37 A.L.R. 2d 1216) to the effect that irrespective of the Treasury [fol. 73] regulations, which provide that the co-owner named in a United States Savings Bond, when predeceased by the other co-owner, will be recognized as the sole owner, nevertheless, if the bonds were purchased with community funds, the proceeds thereof remain the community property of the husband and wife under the laws so providing of the State of their residence, and the heirs or legatees of the spouse first dying may proceed in reconvention against the estate of the surviving spouse holding or collecting on the bonds for a one-half interest representing the interest of the spouse first dying.

"The majority of the courts, however, follow the reasoning discussed by the late Associate Justice Smedley in Edds v. Mitchell, 143 Tex. 307, 184 S. W. 2d 823, 829, 158 A.L.R. 470, to the effect that the Federal status

'authorizing the Secretary of the Treasury to issue the bonds, subject to such terms and conditions as he may prescribe, and the Treasury regulations under which they are issued are the valid exercise of the constitutional power to 'borrow Money on the credit of the United States' (article 1 § 8, cl. 2), and that 'no state law can vary the terms of the Federal obligations or derogate from their full enforceability.'"

In 37 A.L.R. 2d, p. 1223, it is stated:

"Right of surviving co-owner, generally.

§ 3. Majority view.

(a) Generally.

"The rule followed by a majority of the courts, frequently called the 'majority rule,' with respect to rights in United States savings bonds registered in the names of two individuals in the alternative, upon the death of one of the co-Owners, is that the surviving co-owner is vested with the sole ownership in such bonds, at least in the absence of fraud or other inequitable conduct on the part of the survivor."

The dissenting opinion of Justice Walker in Ricks v. Smith, [fol. 74] supra, joined in by two other Justices, in (sic) heavily relied upon by appellee as supportive of his position in this case. However, the majority opinion in Ricks v. Smith, supra, written by Chief Justice Hickman, was agreed to by five other Justices of the Supreme Court, with the Supreme Court dividing 6 to 3 on the case. This court accepts the majority opinion in Ricks v. Smith, supra, as being controlling and decisive.

There was no pleading in the case at bar that the purchase of the bonds in question was in fraud of the community property rights of Mary Ida Free. The bonds in question were bought with the Free's community funds and were made payable to either Mr. Free or Mrs. Free, in conformity with the U. S. Treasury regulations, and a full twelve years elapsed between the purchase of the bonds and the death of Mrs. Free, and certainly under this record there was no actual fraud shown on the part of the

husband in investing community funds in the bonds. It is our further view that under this record the purchase of the bonds and their subsequent passing to the appellant by reason of the unpredictable prior death of Mrs. Free (and under the contractual provisions of the U. S. Treasury regulations) does not in law amount to a constructive fraud upon the estate of Mrs. Free. Also, if Mr. Free had died first and the bonds had passed to Mrs. Free under the contractual treasury regulations we do not think it could be held that a constructive fraud had been committed against Mr. Free's estate by the purchase of the bonds in question under the record in this case.

This court, being an intermediate appellate court, will follow the majority opinions of the Supreme Court of Texas. After careful consideration of the matter it is our considered judgment that the majority opinion of the Supreme Court of Texas in Ricks v. Smith, supra, is controlling and decisive of this case and requires that the judgment of the trial court be reversed and rendered in favor of appellant awarding him full title and possession of the bonds in question, and the fruits thereof, free and clear of any and all asserted claims and liens of appellee.

The judgment of the trial court is reversed and judgment is here rendered in favor of appellant for the full title and possession of the bonds in question, and all the fruits thereof, free and clear of any and all claims and liens asserted by appellee.

Reversed and rendered.

Wm. J. Fanning, Associate Justice.

July 12, 1960.

Filed July 12, 1960.

[fol. 75]

IN THE COURT OF CIVIL APPEALS OF TEXAS

Appealed from the District Court of Upshur County.

No. 7223

J. W. FREE, Appellant,

vs.

JAMES F. BLAND, Individually and as Independent Executor, Appellee.

JUDGMENT—July 12, 1960

This cause came on to be heard on the transcript of the record, and the same being inspected, the court is of the opinion that there was error in the judgment of the trial court wherein the court ordered that the appellee, in equity, ought to recover from the appellant one-half of the value of the bonds, and fixed a lien on the proceeds thereof to enforce the judgment; and that the judgment of the trial court should be reversed and rendered in favor of the appellant.

It Is Therefore Ordered, Adjudged and Decreed by the Court that the judgment of the trial court be and the same is hereby reversed and judgment is now here rendered in favor of the appellant J. W. Free, for the full title and possession of the bonds in question, and all the fruits thereof, free and clear of all claims and liens asserted by appellee, James F. Bland, individually and as executor of the estate of Mrs. Ida Free, deceased, and recover of and from the appellee, James F. Bland, individually and as independent executor of the estate of Ida Free, deceased, all costs in this behalf expended both in this court and the court below.

It Is Further Ordered by the Court that the officers of this court and the court below recover of the appellant, J. W. Free, and of The Western Casualty & Surety Company, surety upon appellant's appeal bond, all costs in-

curred by said appellant on this appeal for all of which execution may issue and this decision be certified to the court below for observance.

[fol. 76]

IN THE SUPREME COURT OF THE STATE OF TEXAS

JAMES F. BLAND, Individually and as Independent Executor, Petitioner,

vs.

J. W. FREE, Respondent.

APPLICATION FOR WRIT OF ERROR—Filed October 14, 1960

To the Honorable Supreme Court of the State of Texas:

Statement of the Case

This case involves the question of the ownership of certain United States Savings Bonds, in the aggregate amount of $87,035.50, which were, generally speaking, made payable to John W. Free or Mary Ida Free, all of which were what has commonly been called and referred to as "and/or" bonds. Petitioner in this case is the independent executor of the estate of Mary Ida Free, deceased. Respondent J. W. Free and Mary Ida Free were husband and wife until her death on the 23rd day of April, 1958. Thereafter, petitioner in this case qualified as executor of the estate of the said Mary Ida Free and no question has been raised in this regard. Among the other assets of the estate of Mary Ida Free, deceased, were the bonds involved in this [fol. 76a] controversy. From the year 1941 through the year 1945, the following co-owner bonds were purchased, payable to "Mrs. Mary Ida Free or Mr. John W. Free;" "Mr. John W. Free or Mrs. Mary Ida Free;" "John W. Free or Mrs. Ida Free;" "J. W. Free or Mrs. Ida Free" and "Mr. John W. Free or Mrs. Ida Free," to-wit: Seven "E" bonds of the par value of One Thousand Dollars each; four "F" bonds of the par value of One Thousand Dollars

each; One "F" bond of the par value of Five Thousand Dollars; and seven "F" bonds of the par value of Ten Thousand Dollars each. At the death of Ida Free, all the bonds so purchased were in existence and the co-owner bonds above described were worth $87,035.50.

Respondent originally filed this suit against petitioner in his capacity as independent executor of the estate of Mary Ida Free, deceased, and individually, to recover the title to and possession of said co-owner United States Government Bonds, together with accrued interest thereon, and for a judgment declaring that respondent was the sole owner of said bonds, and that the petitioner had no rights therein.

In his cross action in the trial court, it was and is here the contention of petitioner that inasmuch as the bonds were indisputably purchased with community funds, that he was entitled to one-half (½) of same, or, in the alternative, that the estate of Mary Ida Free should be reimbursed to the extent of one-half of the value of said bonds.

On a hearing of respondent's motion for summary judg- [fol. 76b] ment, the trial court, on November 23, 1959, rendered judgment for respondent for the title to and possession of said bonds, but rendered judgment that petitioner should recover of and against respondent one-half of the value of said bonds, and fixed a lien on the proceeds thereof to enforce the same. On July 12, 1960, the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas rendered its opinion reversing the judgment theretofore entered by the trial court, and rendered judgment in favor of appellant "for the full title and possession of the bonds in question, and all the fruits thereof, free and clear of any and all claims and liens asserted by appellee."

Thereafter, and within the time provided by law, petitioner filed his motion for rehearing, which said motion for rehearing was overruled on the 6th day of September, 1960; petitioner having perfected his appeal to this Honorable Court by the filing of this, his Application for Writ of Error, within the time prescribed by law.

The opinion handed down by the Court of Civil Appeals clearly stated the case, from a factual point of view, petitioner disagreeing only with the ultimate result arrived at by the Court of Civil Appeals.

Statement of Jurisdiction

The Supreme Court has jurisdiction of this suit under numbered Paragraph 6 of Article 1728, V.A.T.S., as amended.

Points of Error

[fol. 76c]

First Point

The Court of Civil Appeals erred in not holding that petitioner was entitled to one-half of the bonds in question, or, in the alternative, that petitioner was entitled to one-half of the proceeds of the bonds in question and fixing a lien on the proceeds of such bonds to secure payment of same.

Second Point

The Court of Civil Appeals erred in holding that the respondent should have complete title to ownership of and all of the fruits to be derived from the bonds in question in this law suit, free and clear of any and all rights on the part of petitioner.

Third Point

The Court of Civil Appeals erred in holding that the majority opinion in the case of Ricks v. Smith, 318 S.W. 2d 439, forecloses the right of petitioner herein to a recovery of one-half of the bonds in question, or the value thereof.

First Point Restated

The Court of Civil Appeals erred in not holding that petitioner was entitled to one-half of the bonds in question, or, in the alternative, that petitioner was entitled to one-half of the proceeds of the bonds in question and fixing a lien on the proceeds of such bonds to secure payment of same.

Second Point Restated

The Court of Civil Appeals erred in holding that the respondent should have complete title to ownership of and [fol. 76d] all of the fruits to be derived from the bonds in

question in this law suit, free and clear of any and all rights on the part of petitioner.

Third Point Restated

The Court of Civil Appeals erred in holding that the majority opinion in the case of Ricks v. Smith, 318 S.W. 2d 439, forecloses the right of petitioner herein to a recovery of one-half of the bonds in question, or the value thereof.

Statement and Argument

Petitioner can see no reason in this case why the three points of error should not be grouped and briefed together as a matter of convenience to the Court and all parties. The question at issue in this case is as clearly drawn and framed as any could ever be in a law suit. Essentially, it involves the question of whether or not the case of Ricks v. Smith, 318 S.W. 2d 439, heretofore handed down by this Court, on the 5th day of November, 1958, irrevocably forecloses petitioner in this case. By reason of the differences in the factual situation, the trial court did not think Ricks v. Smith covered the instant case. As is perfectly clear from a reading of the opinion by the Honorable Court of Civil Appeals, that Court thought that it did. This is distinctly stated by the Court in the following language:

> "This court, being an intermediate appellate court, will follow the majority opinions of the Supreme Court of Texas. After careful consideration of the matter it is our considered judgment that the majority opinion of the Supreme Court of Texas in Ricks v. Smith, supra, [fol. 76e] is controlling and decisive of this case and requires that the judgment of the trial court be reversed and rendered in favor of appellant awarding him full title and possession of the bonds in question, and the fruits thereof, free and clear of any and all asserted claims and liens of appellee."

This Court will observe the real reluctance of the Court of Civil Appeals in rendering the judgment that it did.

We will agree that if the reasoning applied by the majority of the Court in Ricks v. Smith is followed to its ultimate conclusion, then it does foreclose the matter. There is one basic difference in the two cases. In the Ricks v. Smith case, the husband died first. In this case, the wife died first. At first blush it might appear that this one simple difference in facts is not enough to distinguish the instant case from the Ricks v. Smith case. But the truth of the matter is that this difference is very vital and all important, in that it would permit the Court to render judgment for petitioner in this case without doing violence to its prior decision.

The difference in factual principal in this case and in the Ricks case is this: Where the husband purchases the bonds and dies first, and the wife then obtains the full benefits of the transaction, then no question of fraud, either real or constructive, could arise on the part of the wife toward the husband. But in a case such as this, while petitioner was not in a position to even allege, much less prove actual fraud, a constructive fraud had actually been perpetrated upon her. The petitioner feels fortunate in being able to present this matter to the Court at such an early [fol. 76f] time in order that the bench and bar of the State of Texas might have the benefit of this Court's final say in the matter and the matter finally laid to rest.

It is the simple contention of the petitioner that the Ricks v. Smith case does foreclose the question in this case and if this Court should be of the opinion that it does, then the opinion in the Ricks v. Smith case would be speedily done away with. If Ricks v. Smith foreclosed the issue in this case, then there would not have been any reason or justification for the dissenting opinion by Justice Walker and the other members of the Court who agreed with him. We are not prepared to bring ourselves to believe that this Honorable Court is going to permit a rule promulgated by an administrative agency of the Federal Government to destroy completely the property rights of the citizens of this State. It is difficult for us to visualize our Court making the statement, "There is no sanctity of the community property law above that of other types of law. To give

supremacy to Federal regulations no more affects community property law than laws of descent and distribution." While we do not agree with the statement of this Honorable Court, as set out, nevertheless, an avenue has been opened by the able trial judge in this case in which full force and effect was given to Departmental Circular No. 530, as revised, and still protect the property rights of one of its citizens, in that the able trial judge held that respondent was entitled to the possession and payment of the bonds, but further provided for and fixed a lien against [fol. 76g] any such proceeds to the extent of one-half the value thereof for the benefit of the petitioner. We understand the reasoning behind this departmental regulation. It was and is to provide a speedy and simple plan of payment for these bonds as a matter of convenience to the Treasury Department of the United States and to prevent this agency from being continually embroiled in litigation as to who owned any such bonds or to whom the proceeds of such bonds should be paid.

The Court of Civil Appeals pointed out in its opinion that petitioner relied principally upon the Slater v. Culpepper case, 222 La. 962, 64 So. 2d 234, 237, 37 A.L.R. 2d 1216, and the opinion in the case of In the Matter of the Estate of Bertha Q. Allen, deceased, 343 P. 2d 867, by the Supreme Court of Washington, and the dissenting opinion of Justice Walker in the Ricks v. Smith case. This is true, and we might add that another case has been decided which gives us further ammunition, and that is the case of Anderson v. Benson, 117 F. Supp. 765. We believe these cited cases and the opinion of Justice Walker to be the better reasoned cases and the reasoning which should necessarily be employed by the Court in this case, but we again invite the attention of the Court to the fact that in this case, the able trial judge did award title and possession of the bonds to respondent, which therefore gives effect to the Ricks v. Smith case, but further provided that petitioner should have one-half of the value of the bonds and fixed a lien on the proceeds thereof to secure the payment of the judg- [fol. 76h] ment rendered. This course seems a happy solution to us in the matter and meets any and all objections that could be leveled against it by anybody.

We have been unable to bring ourselves to believe that this Court will allow the property rights of Mrs. Mary Ida Free to be completely disregarded and ignored and the estate of her husband to be unjustly enriched at her expense, when one-half of the money that went into the purchase of these bonds was hers. We can not believe that this Court is going to permit the property rights of its citizens to rest on so tenuous a thread and question as who dies first. In short, we can not believe that this Court will permit its opinion in the Ricks v. Smith case to take away from the estate of Mary Ida Free the approximately $44,000.00 which rightfully belongs to such estate.

It is true that we place great reliance on the dissenting opinion of Justice Walker in the Ricks v. Smith case, and believe that the question which we present falls squarely in line with the problem which he so wisely envisioned in 1958, when he stated that such cases "present little difficulty provided he (the husband) dies first." We present the case envisioned by Justice Walker and we here adopt as a part of this Application, his opinion in that case, and not only that, but with equal vigor, we refer to such dissenting opinion for the purpose of showing conclusively that the majority opinion in such case does not control the instant case.

With all respect we cite even the majority opinion in the [fol. 76i] Ricks v. Smith case, as authority for the proposition contended for by petitioner here; Anderson v. Benson, 117 F. Supp. 765; In the Matter of the Estate of Bertha Q. Allen, deceased, 343 P. 2d 867 and Slater v. Culpepper, 64 So. 2d 234.

It would be easy to write an Application in this case of forty to fifty pages, but it would seem unnecessary and even a little foolish to do so. The issues are very plain and are well known to the Court.

Conclusion

Petitioner prays that upon consideration of this petition, writ of error be granted, and that, upon final hearing, the

judgment of the Court of Civil Appeals be reversed and that of the trial court affirmed.

Respectfully submitted,

Olin P. McWhirter, Greenville National Bank Bldg., Greenville, Texas; Florence, Garrison & Holt, P. O. Drawer 600, Gilmer, Texas, By F. L. Garrison, Attorneys for Petitioner.

[fol. 77]

IN THE SUPREME COURT OF TEXAS

No. A-8079

JAMES F. BLAND, Individually and as Independent Executor, Petitioner,

vs.

J. W. FREE, Respondent.

RESPONDENT'S REPLY TO APPLICATION FOR WRIT OF ERROR —Filed October 18, 1960

[fol. 77a] To the Supreme Court of Texas:

Respondent, J. W. Free, presents this Reply to the Application for Writ of Error of Petitioner, James F. Bland individually and as executor of the estate of Ida Free, deceased, and respectfully urges that such Application should be refused. The opinion of the Court of Civil Appeals in this case correctly states the law and the judgment of the Court is correct.

Statement of the Case

The nature of and material facts in this cause are correctly stated in the opinion of the Court of Civil Appeals.

Foreword

Petitioner takes the unusual position, as we understand his Application, that the Court of Civil Appeals erred in holding:

1. That the purchase of the co-owner bonds was by a contract creating property rights between the purchaser and the Federal Government under Treasury Regulations which have supremacy, as held by this Court in Ricks v. Smith, 318 S.W.2d 439, and in not following the minority holding announced in the Louisiana and Washington cases of Slater v. Culpepper, 222 La. 962, 64 So.2d 234, 37 A.L.R. 2d 126, and In Re Allen's Estate (Wash.) 343 P.2d 867, that [fol. 77b] the Treasury Regulations merely prescribed a method of payment for the convenience of the Government; and, in the alternative

2. That if the principles of law announced in the Ricks case are upheld, then the rules therein announced are not applicable to this case, where the wife predeceased her husband, such rules being only binding on the husband's estate if he dies first, and never binding on the wife's estate, if she dies before her husband; and

3. That the purchase of the bonds here involved and their subsequent passing to Respondent by the death of his wife, does not in law amount to constructive fraud upon the estate of the wife.

We will discuss these questions in the order raised.

Ricks v. Smith Controls

The Court of Civil Appeals correctly held that this case is ruled by the opinion of this Court in Ricks v. Smith, 318 S.W.2d 439. And such Court, in applying the law as announced in the Ricks case, correctly reversed the judgment of the trial court and rendered judgment for Respondent for the title to and possession of the bonds in question, and all the fruits thereof, free and clear of any and all liens or claims asserted by Petitioner.

In the Ricks case, involving similar co-owner bonds, this Court held that the purchase of the bonds there involved was by a contract between the purchaser and the Treasury

Department to the effect that if either co-owner died with-
[fol. 77c] out the bonds having been presented and surrendered for payment or reissue, the surviving co-owner would be recognized as the sole and absolute owner of said bonds, and payment or reissue would be made only to such survivor, as though the bonds were registered in his name alone. This Court further held that there was no sanctity of community property law above that of other types of law, and to give supremacy to Federal Regulations no more affected community property law than laws of descent and distribution, and that the solution as to the property rights of the surviving co-owner rested in the above contract between the purchaser and the Treasury Department, and that such contract became a part of the bonds at the time of their purchase.

Petitioner in this case wants this Court to set aside its holding in the Ricks case, and rewrite the law in line with the holdings of the Louisiana and Washington courts in Slater v. Culpepper and In Re Allen's Estate, supra. This Court declined to follow the reasoning in the Louisiana case of Slater v. Culpepper when it wrote its opinion in Ricks v. Smith, and there is no good reason why it should now follow such reasoning.

In the Louisiana and Washington cases, the Courts of those States refused to give controlling effect to the Treasury Regulations incorporated in the bonds there involved, holding that to do so would nullify community property laws of such states. The fallacy of that reasoning is ably [fol. 77d] demonstrated by this Court in the Ricks case, in the following language, (318 S.W.2d 440):

> "There is no sanctity of the community property law above that of other types of law. To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution. The solution as to the property rights of the surviving co-owner of 'or' bonds rests in contract, and that contract becomes a part of the bonds."

Both the Louisiana and Washington decisions follow the holding of the minority that the contract between the

purchaser of the bonds and the Treasury Department, which were incorporated as a part of said bonds, did not constitute property rights, but only provided a method of payment for the convenience of the Treasury Department, and that the heirs or legatees of the spouse first dying could proceed against the estate of the surviving spouse collecting said bonds, for a one-half interest representing the community interest of the spouse first dying.

No good reason is shown why this Court should retreat from its prior holding in the Ricks case. Identical co-owner bonds are involved here as they were in that case. The bonds here were purchased under the identical contract as the bonds in the Ricks case. The same contract in the Ricks case became a part of the bonds in that case and in this case. The two cases are identical and the holding in this case should be (and was) identical to the holding in the Ricks case, and this Court should refuse the Application for Writ of Error.

[fol. 77e]

Petitioner Bound by Rule in Ricks Case

Petitioner urges that if the principles of law announced by this Court in the Ricks case are upheld, then those rules are not binding on the Petitioner in this cause, because Mrs. Free, the wife, predeceased her husband, the Respondent, and such rules are only binding on the husband's estate, if he dies first, and are never binding on the wife's estate, if she dies before her husband. This argument is without merit. The law announced in the Ricks case is a uniform rule governing ownership of co-owner bonds after the death of either one of the co-owners. It would indeed be a strange rule of law that binds one co-owner, but did not bind the other co-owner.

As above stated, the co-owner bonds in this case are identical to the co-owner bonds in the Ricks case. The contract between the Treasury Department and the purchasers of the bonds are identical in both cases. The only factual difference is that in the Ricks case the husband predeceased the wife, and in this case, the wife predeceased the husband. Therefore, Petitioner argues, the rule in the

Ricks case is not applicable to this case. His only authority is the dissenting opinion in the Ricks case, (318 S.W.2d 441-444). Indeed, Petitioner's whole case is bottomed on the dissent in the Ricks case.

[fol. 77f] A dissenting opinion simply expresses the views of the dissenters, and is not controlling authority for any principle therein announced. Certainly, if this Court had thought the reasoning announced in the dissenting opinion was good Texas law, it would have adopted that opinion as the opinion of the Court. However, this Court thought otherwise, and the dissenting opinion therefore carries no weight.

In the dissenting opinion in the Ricks case, it was urged that the opinion of the Court was wrong; that the Court should hold that upon the death of the husband, the wife as surviving co-owner of the bonds was under a duty to account to the husband's estate for one-half of the value of the bonds at the time of his death; otherwise, the Court would find itself in a position in the future that might either prove untenable or lead to inconsistent or undesirable results. The dissenting opinion further observed that since there was nothing to prevent a husband from making a contract affecting community property for the benefit of his wife, a case in which he invests community funds in bonds payable to himself and his wife presents little difficulty providing the husband dies first. However, the dissent continues, if the wife dies first this Court might be required to hold that the purported contract entered into between the husband and the Treasury Department in the purchase of said bonds was ineffective, because the wife was not a party to that contract, and that absolute owner-[fol. 77g] ship of the bonds might not vest in the surviving husband as co-owner.

The unsoundness of this reasoning lies in the fact that the dissenting opinion is predicated on the false assumption that the husband can make contracts affecting community property *only* for the *benefit* of the wife, and on the further false assumption that the wife was not a party to the contract with the Government.

The falsity of this position is apparent when one considers the effect of Article 4619, Revised Statutes, which

provides, among other things, that "during coverture the common property of the husband and wife may be disposed of by the husband only." Under the above statute, it has been consistently held by this Court and by all the Courts of Civil Appeals, that the husband has the full and absolute right to dispose of community property, even by gift, when not in fraud of the rights of his wife. The courts have proceeded along the theory that the husband is the agent for the wife in the management, control and disposition of the community property, and his acts, when not in fraud of her rights, are binding on her. A few of the cases announcing this doctrine follows:

Boehm v. Beutler, (Com. App.) 41 S.W. 658;
Jackson v. Bradshaw, (Com. App.) 57 S.W. 878;
Gulf, C. & S. F. Ry. Co. v. Fenn, (Com. App.) 76 S.W. 597;
[fol. 77h] Sweeney v. Taylor Bros. (Com. App.) 92 S.W. 442;
Stone v. Jackson, 109 Tex. 385, 210 S.W. 953;
Bell v. Crabb, (Com. App.) 244 S.W. 371;
Shaw v. Shaw, (Tex. Civ. App.) 28 S.W.2d 173;
Gulf Production Company v. Continental Oil Co., (Tex. Civ. App.) 61 S.W.2d 185, affd. 139 Tex. 183, 164 S.W.2d 488;
Krueger v. Krueger, (Tex. Civ. App.) 62 S.W.2d 684;
Mitchell v. Simms, (Com. App.) 63 S.W.2d 371;
Atkins v. Dodds, (Tex. Civ. App.) 121 S.W.2d 1010;
McJunkin v. Republic National Bank, (Tex. Civ. App.) 131 S.W.2d 1085;
Dixie Motor Coach Corp. v. Watson, (Tex. Civ. App.) 138 S.W.2d 314.

In Locke v. Locke, (Tex. Civ. App.) 143 S.W.2d 637, the jury found that the husband, between the date of separation and the date of divorce, converted to his own use, in excess of his living expenses and other necessary expenditures, the sum of $3,900, and the trial court entered judgment for the amount in favor of the wife. In holding that the trial court erred, the Court of Civil Appeals said, (p. 638):

"... Mr. Locke was not guilty of any fraud toward appellee, Mrs. Locke, in the handling of the community estate. The statute, Vernon's Ann. Civ. St. Art. 4619, provides that the community property 'may be disposed of by the husband only.' Such right of the husband to manage, control, and dispose of the community property is absolute so long as it is not exercised for the purpose of defrauding the wife. Jones v. Jones, Tex. Civ. App., 146 S.W. 265. And, barring any disposition [fol. 77i] or dissipation of the property made with intent to defraud the wife, the husband may sell or even give it away. Shaw v. Shaw, Tex. Civ. App., 28 S.W.2d 173. It was therefore essential that Mrs. Locke establish fraud toward her on the part of the appellant in his management of the community property *as a predicate for her right to recover the $3,900 item.*" (italics ours).

It is seen by the above statutes and authorities that the husband, during the existence of the marriage, has absolute control, management and the power to dispose of the community property, other than the homestead, the only limitation being that he must not exercise such power in fraud of the rights of his wife. He can make contracts affecting the community, whether beneficial or detrimental, as long as those contracts are not made with fraudulent intent to defeat his wife's rights.

Therefore, it is seen that when Respondent purchased the bonds involved in this action under a contract with the Secretary of Treasury, (that if either he or his wife died prior to payment or reissuance of said bonds, that the survivor would be recognized as the sole owner and payment would be made only to the survivor), that the wife by virtue of the statute itself, was a party to such contract and bound thereby, in the absence of fraud on her rights. The contract made by Respondent was one authorized by Texas law, and was binding upon his wife, in the absence of intent to defraud the wife out of a part of her interest in the community property, which was neither alleged nor proved.

[fol. 77j] Certainly, Respondent's purchase of the co-owner Government bonds here involved, with community funds, of itself, could never be considered in fraud of the rights of his wife. He thought he was making contracts for the benefit of his wife. The bonds could have been cashed by her at any time without Respondent's joinder. If Respondent had died first, (which he thought would happen), the bonds, and all the fruits thereof, would have belonged to the wife and the estate of Respondent would not have had and could never have recovered any interest therein. Also, it should be noted in this case that there were no allegations or proof of any fraud whatever in the purchase of said bonds.

No Constructive Fraud

While Petitioner admits that there is no pleading or proof in this case raising any issue of fraud by Respondent to his wife, yet he insists that the purchase of the co-owner bonds and their subsequent passing to Respondent by the death of his wife, amounts in law to constructive fraud upon the estate of his wife. This is nonsense.

The Court of Civil Appeals in this case held that "a full twelve years elapsed between the purchase of the bonds and the death of Mrs. Free, and certainly under this record there was no actual fraud shown on the part of the husband in investing community funds in the bonds."

That Court further held that under the record in this case, "the purchase of the bonds and their subsequent pass-
[fol. 77k] ing to Appellant (Respondent) by reason of the unpredictable prior death of Mrs. Free (and under the contractual provisions of the U. S. Treasury Regulations) does not in law amount to a constructive fraud upon the estate of Mrs. Free."

Conclusion

The judgment rendered by the Court of Civil Appeals in this case awarding to Respondent the full title to and possession of the bonds in question, and all the fruits thereof, free and clear of any and all claims and liens asserted by Petitioner, is correct and the only judgment that

it could render under the law of this State. Its opinion is sound and correctly applies the rule announced in the Ricks case.

Petitioner's Application for Writ of Error is without merit and should be refused.

Respectfully submitted,

Fulton, Hancock & McClain, Edwin M. Fulton, Box 500, Gilmer, Texas, Attorneys for Respondent.

[fol. 78]

IN THE SUPREME COURT OF TEXAS

No. A-8079

From Upshur County, Sixth District.

JAMES F. BLAND, Individually and as Independent Executor, Petitioner,

v.

J. W. FREE, Respondent.

PER CURIAM—March 8, 1961

The opinion of the Court of Civil Appeals, reported in 337 S.W. 2d 805, followed our holding in the case of Ricks v. Smith, 159 Tex. 280, 318 S.W. 2d 439 (1958).

Our action on this application for writ of error was held in abeyance until the case of Hilley v. Hilley should be decided because that case would determine our holding in this cause. Prior to our action on this application for writ of error we decided the case of Hilley v. Hilley, (Vol. 4, The Texas Supreme Court Journal, p. 213, Jan. 28, 1961) in which the case of Ricks v. Smith was overruled. The decision of the Court of Civil Appeals in the present case is in conflict with our opinion in the Hilley case.

Under the discretion given us by Rule 483, Texas Rules of Civil Procedure, we reverse the judgment of the Court of Civil Appeals in this case and affirm the judgment of the trial court.

[fol. 79]

IN THE SUPREME COURT OF TEXAS, AUSTIN

No. A-8079

From Upshur County, Sixth District.

JAMES P. BLAND,

vs.

J. W. FREE.

JUDGMENT—March 8, 1961

Application of petitioner, James W. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, for writ of error to the Court of Civil Appeals for the Sixth District having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, but no error in the judgment of the District Court, it is therefore *adjudged, ordered* and *decreed* that, under Rule 483, Texas Rules of Civil Procedure, the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the judgment of the District Court be, and hereby is, affirmed, in accordance with the per curiam opinion herein this day delivered.

It is further ordered that respondent, J. W. Free, and the surety on his appeal bond, The Western Casualty & Supply Co., pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioner, James W. Bland, individually and as Independent Executor of the Estate of Ida Free, deceased, have and recover of and from respondent, J. W. Free, and surety, Western Casualty and Supply Co., the costs by him expended and incurred in said courts, and that this decision be certified to both the Court of Civil Appeals for the Sixth Supreme Judicial District and the District Court of Upshur County, Texas, for observance.

[fol. 80]

IN THE SUPREME COURT OF TEXAS

No. A-8079

JAMES F. BLAND, Individually and as Independent Executor, Petitioner,

v.

J. W. FREE, Respondent.

RESPONDENT'S MOTION FOR REHEARING ON APPLICATION FOR WRIT OF ERROR—Filed March 21, 1961

[fol. 80a] To the Honorable Supreme Court of the State of Texas:

J. W. Free, Respondent herein, respectfully moves the Court to set aside the judgment of this Court rendered on the 8th day of March, A.D. 1961, reversing the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District, at Texarkana, Texas, and affirming the judgment of the trial Court, and to grant him a rehearing and affirm the judgment of said Court of Civil Appeals by refusing the Application for Writ of Error, and as grounds therefor would show:

1.

That this Court erred in failing to give supremacy and controlling effect to the applicable Federal law as is provided in the Constitution of the United States, Art. 6, Clause 2.

2.

That this Court erred in holding that the applicable Federal law, as contained in the Constitution of the United States, the Statutes of the United States and the regulations of the United States Treasury Department pertaining to United States Savings Bonds did not control the rights

and title of the parties arising by virtue of the purchase of said bonds.

[fol. 80b]

3.

That this Court erred in holding that the validity and construction of the contract between Respondent and the United States Government whereby the United States Savings Bonds were purchased, the consequences of such contract on the rights and obligations of the parties thereto, and the titles and liens which such contract created or permits, are not controlled by Federal law.

4.

That this Court erred in holding that the rights and title created by a contract with the United States Government for the purchase of United States Savings Bonds are controlled by the law of the State of Texas.

5.

That this Court erred in not discussing the Federal questions involved herein by the novel application of Rule 483, Texas Rules of Civil Procedure, to reverse the judgment of the Court of Civil Appeals on the authority of dicta contained in an opinion rendered by this Court long subsequent to the decision of said Court of Civil Appeals.

6.

That this Court erred in holding that the community property laws of the State of Texas are supreme and override the provisions of Federal law applicable to property rights created by a contract of a citizen of the United States residing in Texas with the United States Government.

[fol. 80c]

7.

That this Court erred in holding that the Probate Code of the State of Texas limits the right of a resident of Texas to enter into a contract with the United States Government for the purchase of United States Savings Bonds that

contain the co-owner provisions authorized and required by Federal law.

8.

That this Court erred in holding the funds recognized as community funds by the law of Texas cannot be invested in co-owner United States Savings Bonds so as to give to the purchaser thereof the rights, titles and interest such contract with the United States Government gives the parties thereto under the applicable Federal law.

9.

That this Court erred in holding that the opinion of the Court of Civil Appeals herein is in conflict with this Court's opinion in the case of Hilley v. Hilley, rendered on January 28, 1961, and reported in Volume 4, The Texas Supreme Court Journal, page 213, because the contract involved in the Hilley case was not a contract to which the Government of the United States was a party.

10.

That this Court erred in holding that Rule 483, Texas Rules of Civil Procedure, is applicable to this case because [fol. 80d] the opinion of the Court of Civil Appeals herein was not in conflict with a "previous" opinion of this Court, because the Hilley case was handed down on January 28, 1961, and the Court of Civil Appeals had entered its decision on July 12, 1960, over six months prior to this Court's opinion in the Hilley case, and the opinion of the Court of Civil Appeals conformed to the decision of this Court in the case of Ricks v. Smith, 159 Tex. 280, 318 S.W.2d 439, which was, and is the only other case this Court has ever written involving the rights of a surviving co-owner of United States Savings Bonds.

11.

That this Court erred in holding that the law of the State of Texas controlled and was supreme to Federal law, in determining the nature of the rights of the parties created

by the issuance of the United States Savings Bonds involved herein.

Wherefore, premises considered, Respondent prays that this Motion for a Rehearing be granted and that Petitioner's Application for a Writ of Error herein be refused.

Respectfully submitted,

Fulton, Hancock & McClain, W. C. Hancock, Box 500, Gilmer, Texas, Attorneys for Respondent.

[fol. 81]

IN THE SUPREME COURT OF TEXAS, AUSTIN

No. A-8079

From Upshur County, Sixth District.

JAMES F. BLAND,

vs.

J. W. FREE.

ORDER OVERRULING MOTION FOR REHEARING—April 5, 1961

Respondent's motion for rehearing on the judgment entered on March 8, 1961, reversing judgment of the Court of Civil Appeals and affirming judgment of the District Court, under Rule 483, Texas Rules of Civil Procedure, in the above numbered and entitled cause, having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

[fol. 82]

IN THE SUPREME COURT OF TEXAS

No. A-8079

From Upshur County, Sixth District.

JAMES F. BLAND,

vs.

J. W. FREE.

ORDER STAYING MANDATE

Motion of respondent, J. W. Free, to stay issuance of mandate pending application for writ of certiorari to the Supreme Court of the United States, filed in the above numbered and entitled cause on April 7, 1961, having been duly considered by the Court, it is ordered that said motion be, and hereby is, granted, and that mandate of this Court in said cause not be issued pending respondent's application for writ of certiorari to the Supreme Court of the United States, and the termination thereof, or until the further orders of this Court.

[fol. 88] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 89]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 9, 1961

The petition herein for a writ of certiorari to the Supreme Court of the State of Texas is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.